No. 95-489

In the Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS JONES, TREASURER, PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Federal Election Commission reasonably determined that the payments at issue in this case were subject to the Federal Election Campaign Act's limitations on contributions to candidates for federal office, as defined to include coordinated expenditures in support of those candidates.

2. Whether application of the Act to the payments at issue in this case violated the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 32-48) is reported at 59 F.3d 1015. The opinion of the district court (J.A. 17-31) is reported at 839 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A suggestion for rehearing in banc was denied on September 6, 1995. J.A. 49. The petition for a writ of certiorari was filed on September 21, 1995, and was granted on January 5, 1996 (116 S. Ct. 689). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.*, are set forth in the appendix to this brief: 2 U.S.C. 431(8)(A)(i) (definition of "contribution"), 431(9)(A)(i) definition of "expenditure"), 431(17) (definition of "independent expenditure"), 441a(a)(1) and (2) (dollar limits on contributions), 441a(a)(7)(B)(i) (treatment of coordinated expenditures), 441a(d) (expenditures by political party committees).

STATEMENT

1. This case concerns the Federal Election Campaign Act of 1971 (FECA or Act), as amended, 2 U.S.C. 431 *et seq.* The Act imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1,000, and multicandidate political committees [1] no more than $5,000, to any candidate with respect to any election. 2 U.S.C. 441a(a)(1)(A) and (2)(A). The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or the candidate's agents—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). The Act defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i).

[1] A multicandidate political committee is "a political committee which has been registered under [2 U.S.C. 433] for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office." 2 U.S.C. 441a(a)(4); see 11 C.F.R. 100.5(e)(3).

Under the regulatory scheme established by the Federal Election Commission (FEC or Commission),[2] application of the statutory contribution limits to expenditures by political parties depends upon whether an expenditure is "allocable" or "attributable" to a particular candidate. FEC Adivisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185 (May 30, 1985) (AO 1985-14); see FEC Advisory Op. 1984-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5766 (May 31, 1984). "Generic" appeals for public support for a party's federal candidates (*e.g.*, "Support Republicans for Congress") are considered "expenditures" (because they are made "for the purpose of influencing" federal elections, 2 U.S.C. 431(9)(A)(i)), but they are not allocable or attributable to particular candidates. See AO 1985-14, at 11,185-11,186. They are therefore not deemed to be "coordinated" expenditures—expenditures made "in cooperation, consultation, or concert, with" a candidate or the candidate's agents, 2 U.S.C. 441a(a)(7)(B)(i), and are, consequently, not subject to the Act's contribution limits. Where a party expenditure is used to finance communicative activities, the Commission has determined that the expenditure will be considered attributable or allocable to a particular campaign only if the communication refers to a "clearly identified candidate" and contains an "electioneering message." AO 1985-14, at 11,185.[3]

[2] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has expressly authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1), 437d(e); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

[3] Some coordinated expenditures do not involve speech at all, making the "electioneering message" test irrelevant. For example,

If a party committee's expenditure *is* attributable to a particular candidate, it is deemed by the Commission, as a matter of law, to be made "in cooperation, consultation, or concert, with" that candidate. 2 U.S.C. 441a(a)(7)(B)(i).[4] All party "expenditures" attributable to particular candidates are therefore treated as "coordinated expenditures," and are subject to the Act's limitations on contributions. The Act, however, allows party committees to make such coordinated expenditures in amounts substantially greater than the contribution limits that apply to individuals and to other organizations.[5] An exception to the Act's general contribution limits thus provides that, "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions," the national and state committees of a political party "may make expenditures in connection with the general election campaign of candidates for Federal office" up to certain specified amounts. 2 U.S.C. 441a(d)(1).[6] See H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for [Section

a party committee's payment to hire security guards for a candidate's campaign appearance would be a coordinated expenditure subject to the Act's contribution limits.

[4] Political "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28-29 n.1 (1981) (*DSCC*). See 11 C.F.R. 110.7(b)(4) (party committees "shall not make independent expenditures in connection with the general election campaign of candidates for Federal office").

[5] In addition to limits imposed by the Act on individual contributions, it also places a general limit of $5,000 upon a multicandidate political committee's contributions to any candidate for federal office. 2 U.S.C. 441a(a)(2)(A).

[6] In determining whether a party expenditure for communicative activity is made "in connection with" a general election campaign for purposes of Section 441a(d), the Commission employs the same test (depiction of a "clearly identified candidate" plus communication of an "electioneering message") that it utilizes in determining

441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]"). In elections for the United States Senate, the national and state party committees may each expend the greater of $20,000 or 2 cents multiplied by the voting age population of the State in which the election is held. 2 U.S.C. 441a(d)(3)(A).[7] If a state party committee chooses not to make the coordinated expenditures permitted by law, it may assign its right to do so to a designated agent, such as a national committee of the party. See *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-43 (1981).

The FECA requires detailed recordkeeping and reporting of all contributions and expenditures. 2 U.S.C. 432, 434. Coordinated expenditures made by political party committees pursuant to Section 441a(d) must be reported by the committees separately from other contributions and expenditures. 2 U.S.C. 434(b)(4)(H)(iv).

2. On March 14, 1986, petitioner Colorado Republican Federal Campaign Committee (the Committee) assigned to the National Republican Senatorial Committee (NRSC) its entire coordinated expenditure authority ($103,248) for the 1986 Colorado Senate campaign, in which one United States Senate seat was to be contested. J.A. 35, 175. In January, 1986, then-Representative Timothy E. Wirth, a Democrat, registered with the FEC as a candidate in that year's Colorado United States Sen-

whether an expenditure is attributable to an individual candidate. See AO 1985-14, at 11,185; FEC Advisory Op. 1980-119, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5561, at 10,691 (Oct. 24, 1980).

[7] As construed by the Commission, Section 441a(d) permits a state party committee to make coordinated expenditures up to the limits set out in Section 441a(d)(2) and (3) in addition to the $5,000 that can be contributed directly to the candidate. See 11 C.F.R. 110.7(b)(3); AO 1985-14, at 11,186 n.5. Thus, if a party committee's coordinated expenditures exceeded the limits established by Section 441a(d)(2) and (3), the excess expenditure could be treated, up to the amount of $5,000, as an in-kind contribution falling within the limitations of Section 441a(a)(2).

ate election. J.A. 33. In April, 1986, the Committee spent $15,000 to broadcast a radio advertisement, "Wirth Facts #1." See J.A. 56, 64. The text of the advertisement was as follows:

> Paid for by the Colorado Republican State Central Committee.
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

J.A. 161. At a press conference contemporaneous with the broadcast of the advertisement, the chairman of the Colorado Republican Party stated that only after "the public know[s] what Tim Wirth's record *really is* * * * will the voters be able to make an informed decision regarding who will be Colorado's next U.S. Senator." J.A. 148. The chairman asserted that "[i]t's too bad that [Wirth] has only discovered the need for a strong national defense now that he's running for the Senate." J.A. 146. At the time that the advertisement was broadcast, neither the Democratic nor the Republican Party had nominated its candidate for the Colorado Senate seat. J.A. 33. Three candidates were in contention for the Republican nomination. J.A. 195-196.[8]

[8] The Committee made the expenditure from its federal account, see 11 C.F.R. 102.5(a)(1)(i), but did not report the expenditure to the FEC as being in connection with the Colorado Senate campaign. The Committee's report to the Commission did reflect the expenditure's electoral purpose, however, by characterizing it as "Voter Information to Colorado Voters—Advertising." J.A. 179.

After investigating an administrative complaint filed by the Colorado Democratic Party pursuant to 2 U.S.C. 437g(a)(1), the FEC determined that the Committee's expenditure on "Wirth Facts #1" was a coordinated party expenditure subject to the limitations of Section 441a of the FECA. Because the Committee had previously assigned its entire Section 441a(d) coordinated expenditure authority to the NRSC,[9] the Commission found probable cause to believe (see 2 U.S.C. 437g(a)(4)) that it had violated 2 U.S.C. 441a(f), which prohibits contributions and expenditures in violation of Section 441a. Because the Committee had failed to report the payment as an expenditure under Section 441a(d), the FEC also found probable cause to believe that the Committee had violated the reporting requirements of 2 U.S.C. 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). J.A. 136-139; Pet. App. 43a-46a, 56a.[10]

3. After conciliation efforts under 2 U.S.C. 437g(a)(4) were unsuccessful, the Commission authorized the filing of this civil enforcement action.[11] The district court

[9] If the Committee had not assigned to the NRSC its coordinated expenditure authority, the payment at issue in this case would have been authorized by Section 441a(d). Under the statutory formula set forth in Section 441a(d)(3)(A)(i), the Committee would have been authorized to make expenditures of up to $103,248 in connection with the 1986 Senate campaign. J.A. 35. The Committee spent $15,000 on "Wirth Facts #1." J.A. 33.

[10] The administrative complaint also challenged the Committee's payments for two other radio advertisements and two pamphlets, all of which criticized Representative Wirth's record without alluding to his Senate campaign. By a vote of 3-3, the Commission failed to find probable cause to believe that those payments violated the Act. J.A. 136; see Pet. App. 93a-105a.

[11] The complaint in this action named the Committee's treasurer, as well as the Committee, as respondents, and the treasurer is a petitioner in this Court. A political committee's treasurer has legal responsibility for approving all expenditures, 2 U.S.C. 432(a), for keeping the committee's records, 2 U.S.C. 432(c), and for filing

granted petitioners' motion for summary judgment. J.A. 17-31. The court acknowledged that a party expenditure can be "coordinated" even if it is made before the party's nominee is officially selected. J.A. 23. The court reasoned that the expenditure here "was made on behalf of the Republican candidate, whomever [*sic*] that might be; and it is irrelevant that no particular person had been designated." *Ibid.* The court concluded, however, that the expenditure in question had not been made "in connection with the general election campaign of a candidate for Federal office" within the meaning of Section 441a (d)(3), because the advertisement paid for by the expenditure did not contain "express advocacy" of the election or defeat of a particular candidate. J.A. 23-28.[12]

In so holding, the district court placed substantial reliance on this Court's decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which involved a prohibition (2 U.S.C. 441b(a)) on independent expenditures by corporate entities "in connection with any election" to any federal office. The Court

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the committee's disclosure reports with the Commission, 2 U.S.C. 434(a)(1).

[12] This Court has stated that an express advocacy test would restrict the application of the statutory limits "to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley* v. *Valeo*, 424 U.S. at 44 (per curiam). Express advocacy would include the use of terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. See also *id.* at 80 ("spending that is unambiguously related to the campaign of a particular federal candidate"); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (publication found to contain express advocacy where it "not only urge[d] voters to vote for 'pro-life' candidates, but also identifie[d] and provide[d] photographs of specific candidates fitting that description"); *FEC* v. *Furgatch*, 807 F.2d 857, 864 (9th Cir.) (speech that is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate"), cert. denied, 484 U.S. 850 (1987).

in *MCFL* held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249. Applying the canon of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning," the district court concluded that the phrase "in connection with" should be given the same construction in Section 441a(d)(3) as in Section 441b. J.A. 24. The court rejected the FEC's contention that the phrase "in connection with," as used in Section 441a(d)(3), should be construed more broadly to cover all communications that contain a "clearly identified candidate" and an "electioneering message." J.A. 25-28; see page 3 & note 6, *supra*. The court concluded that "Wirth Facts #1" did not contain "express advocacy" of Wirth's defeat, J.A. 28-31, and that petitioners' expenditure on the advertisement therefore "was not subject to section 441a (d)(3) limitations and did not violate the Act," J.A. 31. Because the district court found that no violation of the FECA had occurred, it did not reach petitioners' constitutional challenge to the statutory restrictions on political party expenditures. *Ibid.*

4. The court of appeals reversed. J.A. 32-48. The court first stated that "[t]he FECA does not clearly manifest the meaning Congress intended to attach to the 'expenditures in connection with' language in § 441a(d)(3)." J.A. 37. The court found *MCFL* inapposite, explaining that the independent expenditures limited by Section 441b are substantially different—both in their treatment under the FECA and in the degree of protection afforded them by the Constitution—from the coordinated expenditures at issue here. J.A. 39-41. In light of the FEC's " 'primary and substantial responsibility for administering and enforcing' the FECA," J.A. 42 (quoting *Buckley* v. *Valeo*, 424 U.S. at 109 (per curiam)), the court of appeals concluded that the Commission's "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candi-

date and conveying an electioneering message is a reasonable one to which [the court] must defer," J.A. 42. The court found that Representative Wirth was a clearly identified candidate at the time "Wirth Facts #1" was broadcast, J.A. 44, and that the advertisement "unquestionably contained an electioneering message," J.A. 45.

The court of appeals then addressed and rejected petitioners' constitutional challenge to the statutory restrictions on coordinated party expenditures. The court observed that "[t]he primary purpose of the contribution and expenditure caps in the FECA [is] to prevent corruption or the appearance of corruption," J.A. 46, and that "[t]he same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees," J.A. 47. The court rejected the claim that contributions from committees operated by a political party can never be corrupting, *ibid.*, and concluded that, "[b]y treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, 'secur[ing] a political *quid pro quo* from current and potential office holders,'" J.A. 48 (quoting *Buckley* v. *Valeo*, 424 U.S. at 26 (per curiam)).

SUMMARY OF ARGUMENT

I. In contending that their conduct did not violate the Federal Election Campaign Act of 1971, petitioners argue that the payments at issue in this case fall outside the coverage of 2 U.S.C. 441a(d) because they were not made "in connection with" the 1986 Colorado Senate campaign. Petitioners' focus on Section 441a(d) is misconceived. Section 441a(d) is not a *restriction* on spending by political parties; rather, it serves to *authorize* party expenditures that would otherwise be violative of the Act's limits on contributions. The pertinent statutory

question in this case, therefore, is not whether the payment at issue was prohibited by Section 441a(d), but whether it exceeded the statutory limitations on contributions, defined by the Act to include coordinated expenditures.

The payments at issue in this case fall squarely within the FECA's definition of "expenditure," which includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The Commission was not required to prove that the communications in question contained "express advocacy" of the election or defeat of a particular candidate. Based on constitutional concerns, this Court has construed FECA provisions governing independent expenditures to apply only to payments used for express advocacy. The Court has never applied that standard to coordinated expenditures, however, and it should not do so here. Because there would be little difficulty in "devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign," *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976) (per curiam), such a construction would eviscerate the Act's restrictions on coordinated expenditures. Such a construction would be especially unwarranted in light of post-*Buckley* amendments to the FECA, which incorporate an "express advocacy" requirement into the statutory definition of "independent expenditure" but not into the definitions of "contribution" and "expenditure."

The FEC's conclusion that the payments at issue here were subject to the Act's monetary limitations rests in part on the Commission's determination that, because "Wirth Facts #1" depicted a "clearly identified candidate" and communicated an "electioneering message," it was "attributable" to the 1986 Colorado Senate race. The Commission's standard for determining whether a party expenditure is attributable to a particular election

is entitled to substantial deference from a reviewing court, and the court of appeals correctly upheld the FEC's approach. There is, in particular, no basis for petitioners' contention that the Commission's "clearly identified candidate"/"electioneering message" standard represents an unexplained departure from prior FEC pronouncements. The Commission has also reasonably determined that, because "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates," *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28 n.1 (1981) (*DSCC*), all party expenditures attributable to individual candidates are deemed "coordinated."

II. The FECA's restrictions on coordinated expenditures by political parties do not violate the First Amendment. Those restrictions serve the government's compelling interests in (a) preventing the reality and appearance of quid pro quo corruption by the political parties themselves, and (b) preventing circumvention of the statutory limitations on campaign contributions by other donors.

A. Beginning with *Buckley* v. *Valeo*, this Court has recognized a sharp constitutional distinction between limitations on contributions to political candidates and limitations on independent expenditures. The Court has consistently upheld the FECA's limitations on contributions and coordinated expenditures because those limitations serve a compelling interest in foreclosing opportunities for the corruption of candidates. Those holdings are fully applicable here.

There is no merit to petitioners' contention that the Commission must produce record evidence showing that federal candidates have in fact been corrupted by contributions from a political party. This Court in *Buckley* did not require evidence of actual corruption by particular classes of contributors, but accepted Congress's judgment as to the need for prophylactic measures in order to prevent the fact and appearance of quid pro quo

corruption. Nor is there any basis for petitioners' argument that political parties are incapable of exerting a corrupting influence over the candidates whom they support. Political parties act through their employees and agents, and individual party officials may be tempted to use their control over the party's expenditures in order to advance their private interests. In any event, the danger at which the Act's contribution limitations are directed does not depend on the invidious motivation of the contributor. It inheres in any arrangement in which an official's actions are driven by the prospect of substantial monetary reward, even where the contributor who seeks to exercise "coercive influence," *Buckley* v. *Valeo*, 424 U.S. at 25 (per curiam), over the formulation of public policy is motivated solely by a concern for the public good.

Political parties have no constitutional entitlement to an exemption from the contribution limitations that apply to other donors. Although party officials may legitimately seek in a variety of ways to influence the behavior of members who hold public office, Congress may permissibly limit their ability to employ sizeable monetary contributions as a means of achieving their desired ends. Contrary to petitioners' contention, the FECA does not discriminate against political parties. To the contrary, Section 441a(d) permits parties to make coordinated expenditures far in excess of those that can be made by any other entity. In other respects as well, the Act includes special accommodations to party activities. Congress thus endeavored to strike an appropriate balance between the prevention of actual or apparent corruption and the desire to "assur[e] that political parties will continue to have an important role in federal elections." *DSCC*, 454 U.S. at 41. The Court should respect that balance.

B. The FECA's restrictions on coordinated party expenditures also serve the compelling governmental interest in preventing evasion of the contribution limits on in-

dividuals and political committees. Although individuals can contribute no more than $1,000 to a candidate, they can contribute up to $5,000 to a multicandidate political committee operated by a state political party, and up to $20,000 to a political committee operated by a national political party. 2 U.S.C. 441a(a). An individual who wished to provide financial support to a candidate in excess of the $1,000 limit might attempt to circumvent that statutory restriction by making a large contribution to that candidate's political party, with the expectation that the party would in turn expend the funds in support of the candidate. Nothing in the Act precludes candidates and officeholders from urging their contributors to make additional contributions to a party committee, and such solicitations are not unusual. Congress may legitimately act to prevent the use of such practices as means of circumventing the Act's restrictions on individual contributions.

C. The FECA provisions governing coordinated party expenditures are not unconstitutionally vague. Persons of "common intelligence," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973), would have no difficulty understanding that an advertisement explicitly linking an attack on the record of an opposing candidate with his ongoing Senate campaign contained an "electioneering message." The availability of advisory opinions construing the Act as applied to particular factual circumstances provides further assurance that regulated parties can receive fair warning as to the nature of the conduct that the statute prohibits.

ARGUMENT

I. THE PAYMENTS AT ISSUE IN THIS CASE WERE GOVERNED BY THE LIMITATIONS OF 2 U.S.C. 441a(a)(2)

The Federal Election Campaign Act of 1971 (FECA or Act) provides that "[n]o multicandidate political committee shall make contributions * * * to any candidate

and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000." 2 U.S.C. 441a(a)(2)(A). The Act states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents"—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). The FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). Under the regulatory framework established by the FEC, a political party expenditure that is "attributable" to an individual candidate is treated as a coordinated party expenditure, and thus as subject to the contribution limits for that candidate. See 2 U.S.C. 441a(a)(7)(B)(i); page 3, *supra*.

Section 441a(d)(1), however, authorizes political parties to make coordinated expenditures that would otherwise exceed the Act's limitations on contributions to candidates. Section 441a(d)(1) states that, "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions," a national or state political party "may make expenditures in connection with the general election campaign of candidates for Federal office," subject to the monetary limits set forth in Section 441(d)(2) and (3). Section 441a(d)(3) provides in turn that, in elections for the United States Senate, a national or state party committee "may not make any expenditure in connection with the general election campaign" in excess of the greater of $20,000 or 2 cents multiplied by the voting age population of the State. 2 U.S.C. 441a(d)(3)(A).

Petitioners contend that the payment at issue in this case was not made "in connection with" the 1986 Colorado Senate campaign, and that Section 441a(d) is therefore inapplicable. Petitioners base that argument on the fact that "Wirth Facts #1" was not found to have contained "express advocacy" of the election or defeat of a particular candidate.[13] Petitioners err in focusing their attention on the applicability of Section 441a(d) to the payment they made. That provision does not impose restrictions upon political parties more stringent than those imposed by the rest of the Act. To the contrary, Section 441a(d) serves to *authorize* expenditures that would otherwise be impermissible because violative of the FECA's limits on contributions. See *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28 (1981) (*DSCC*) (Section 441a(d) "authorizes limited expenditures by the national and state committees of a political party * * * which otherwise would be impermissible"); H.R. Conf. Rep. No. 1057, 94th Cong., 2d

[13] A regulation recently promulgated by the FEC provides that communications will be considered to contain express advocacy if those communications

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

60 Fed. Reg. 35,305 (1995) (to be codified at 11 C.F.R. 100.22(b)). Because the Commission does not regard the express advocacy test as the appropriate standard for determining whether coordinated expenditures by political parties are permissible, the FEC took and takes no position on the question whether "Wirth Facts #1" contains express advocacy.

Sess. 59 (1976) ("but for [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]"); FEC Advisory Op. 1980-119, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5561, at 10,691 (Oct. 24, 1980) (AO 1980-119) ("The right to make 441a(d) expenditures connected with a general election is an exception for political party committees permitting them to engage in certain activity that would otherwise result in a contribution to the candidate with respect to whom the expenditure was made."). If petitioners were correct in arguing that the expenditure at issue here was not made "in connection with" the 1986 Colorado Senate election, making Section 441a(d) inapplicable to that payment, the expenditure would not thereby be exempted from the FECA's restrictions. Rather, the inapplicability of Section 441a(d) would mean that the payment would be governed by Section 441a(a)'s restrictions on contributions, as defined by Section 441a(a)(7)(B)(i) to include coordinated expenditures like that made by petitioners in this case.

Thus, the pertinent question in this case is not whether the Committee's payment for "Wirth Facts #1" was prohibited by Section 441a(d). The relevant question is whether the Act's limitations on contributions, defined to include coordinated expenditures, prohibited the payment made here. If the Commission properly concluded that the payment at issue here was a coordinated expenditure in an amount exceeding the Act's contribution limitations, Section 441a(d) could not authorize petitioners to make it, because the Committee had previously assigned to the National Republican Senatorial Committee (NRSC) its entire coordinated expenditure authority for the 1986 Colorado Senate campaign.[14]

[14] If the Committee had not assigned to the NRSC its coordinated expenditure authority, the payments at issue in this case would have been authorized by Section 441a(d). See note 9, *supra*.

The Court's inquiry should therefore focus on the questions (a) whether the Committee's payment for "Wirth Facts #1" was an "expenditure" within the meaning of the Act, and (b) whether that payment was properly treated by the Commission as a "coordinated" expenditure.[15] Petitioners do not contest either of those propositions. As we demonstrate below, both are correct. Because the payment for "Wirth Facts #1" exceeded Section 441a(a)(2)(A)'s contribution limits and was not authorized by Section 441a(d), petitioners' conduct violated the Act.

A. The Payments At Issue In This Case Were "Expenditures" Within The Meaning Of The FECA

1. The FECA defines the term "expenditure" to include "any purchase, payment, distribution, loan, advance,

[15] As noted above, see note 6, *supra*, under the FEC's implementation of the statute, the question whether a party expenditure is attributable to a particular campaign (and thus constitutes a coordinated party expenditure) turns on the same factors—depiction of a clearly identified candidate and communication of an electioneering message—as the question whether the expenditure is made "in connection with" that election. To construe the phrase "in connection with" more narrowly (*i.e.*, as covering only a subset of party expenditures attributable to individual elections) would not advance the interests of political parties. To the contrary, such an approach would create a category of political party expenditures that are subject (as coordinated expenditures) to the Act's contribution limitations but that are not authorized by Section 441a(d), thus disserving Section 441a(d)'s purpose of allowing party committees to make coordinated expenditures substantially in excess of those permitted to other donors.

As a practical matter, a determination that the Committee's expenditure for "Wirth Facts #1" was not made "in connection with" the 1986 Senate race would result in that expenditure not being subject to the Act's monetary limits. That would be so, however, not because the payment would fall outside Section 441a(d), but because it would fall outside Section 441a(a)(7)(B)(i).

deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The payments at issue in this case fall squarely within that definition. As the court of appeals observed, "[a]ny reasonable reading of 'Wirth Facts #1' * * * would leave the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and 'garner support' for the unnamed Republican nominee." J.A. 45 (quoting FEC Advisory Op. 1984-15, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5766, at 11,069 (May 31, 1984) (AO 1984-15)). That uncontested finding provides a sufficient basis for the determination that the payments in question were made "for the purposes of influencing" the 1986 Colorado Senate election and were therefore "expenditures" within the meaning of the FECA. 2 U.S.C. 431(9)(A)(i); cf. AO 1984-15, at 11,070 ("These advertisements effectively advocate the defeat of a clearly identified candidate in connection with [the presidential] election and thus have the purpose of influencing the outcome of the general election for President of the United States.").[16]

[16] On April 4, 1986 (J.A. 144), the date on which "Wirth Facts #1" began to air (J.A. 101), petitioner's chairman gave a press conference in which he linked criticisms of Wirth's own advertisements to the upcoming Senate election:

> In Colorado, a man is only as good as his word. After viewing [Wirth's] ads, Coloradans should ask, "What are Tim Wirth's words worth?" With blatant disregard for the facts, he has purchased television time to baldly misstate his record on two key issues: defense and federal spending.
>
> This press conference is to serve notice that Tim Wirth will not get away with it. His record will be scrutinized as it has never been, and we in the Republican party are committed to letting the public know what Tim Wirth's record *really is*. Only then will the voters be able to make an informed decision regarding who will be Colorado's next U.S. Senator.

J.A. 147-148.

2. The Commission was not required to prove that the communication in question contained "express advocacy" of the election or defeat of a particular candidate in order to find that petitioners' disbursement for "Wirth Facts #1" constituted an "expenditure." In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed the proper construction of FECA provisions that placed limits upon, and required reporting of, independent expenditures "relative to" candidates for federal office or made "for the purpose of * * * influencing" a nomination or election. See *id.* at 41-42, 77 (per curiam). Because of constitutional concerns, the Court construed those provisions to apply only to payments for communications that "expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted); see *id.* at 43. In its subsequent decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (*MCFL*), the Court gave the same construction to 2 U.S.C. 441b's prohibition on independent corporate expenditures in connection with federal elections.

The *Buckley* Court thus construed the phrase "for the purpose of * * * influencing" in the Act's definition of "expenditure" as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 77-80 (footnote omitted) (per curiam). That holding, however, does not govern the statutory provisions at issue in this case. As we describe below, see pages 26-28, *infra*, "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates," *DSCC*, 454 U.S. at 28-29 n.1, and party expenditures attributable to particular candidates are therefore treated as coordinated expenditures subject to the Act's contribution limits. The Court in *Buckley* did not apply the express advocacy test to such coordinated expenditures. Rather, the Court observed that "controlled or coordinated expenditures are

treated as contributions rather than expenditures under the Act." 424 U.S. at 46 (per curiam). The Court understood "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee * * * but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," and found that, "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." *Id.* at 78. It was only when the Court construed the statutory provisions as they applied to *independent* expenditures that it applied the express advocacy test. *Id.* at 78-79. See also *MCFL*, 479 U.S. at 249 (applying express advocacy requirement to 2 U.S.C. 441b, a statutory provision that "directly regulates independent spending"); *Orloski* v. *FEC*, 795 F.2d 156, 166-167 (D.C. Cir. 1986) ("[T]he Court limited [the express advocacy definition] to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions.").[17]

Even if the *Buckley* Court's treatment of the issue were not deemed dispositive, subsequent statutory amendments make clear that Congress did not intend the express advocacy test to apply to the statutory limitations on coordinated expenditures. As amended in 1976, shortly after this Court's decision in *Buckley*, the Act's definition

[17] In fact, the Court did not find that a narrowing construction was required even for independent expenditures of political committees. Because the Court found that political committees are by definition "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," the Court concluded that all expenditures of such committees "can be assumed to fall within the core area sought to be addressed by Congress" because "[t]hey are, by definition, campaign related." *Buckley* v. *Valeo*, 424 U.S. at 79 (per curiam).

of "independent expenditure" includes the requirement that the payment be one "expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. 431(17).[18] Other provisions of the Act also incorporate the express advocacy standard. See 2 U.S.C. 431(9)(B)(iii), 441d(a). The definitions of "contribution" and "expenditure," however, include no reference to express advocacy. See 2 U.S.C. 431(8)(A), 431(9)(A). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987) (per curiam) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The absence of an express advocacy requirement in the statutory definitions of "contribution" and "expenditure" is persuasive evidence that coordinated expenditures need not contain express advocacy in order to be subject to the Act's regulatory provisions.

Application of the "express advocacy" standard to the Act's limits on coordinated expenditures would have important and adverse consequences. That construction would permit any interest group—including a corporation, union, or political interest group—to make coordinated political expenditures in support of a candidate without financial limit, so long as those expenditures avoided "express advocacy." As this Court has observed, there would not be "much difficulty [in] devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Buckley* v. *Valeo*, 424 U.S. at 45

[18] The Conference Report accompanying the 1976 amendments states that "[t]he definition of the term 'independent expenditure' * * * is intended to be consistent with the discussion of independent political expenditures which was included in *Buckley* v. *Valeo*." H.R. Conf. Rep. No. 1057, *supra*, at 38.

(per curiam). Application of the "express advocacy" standard to the statutory limits on coordinated expenditures would thus substantially impair the Act's effectiveness in reducing both the fact and the appearance of political corruption.

B. The Payments In Question Were "Coordinated Expenditures" Subject To The FECA's Limitations On Contributions

The FECA provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). Political party committees are "persons" for purposes of that provision. See 2 U.S.C. 431(11). The Commission's conclusion that a particular party expenditure is "coordinated" rests on two subsidiary determinations—one case-specific and one categorical. First, a party expenditure is coordinated only if it is attributable to a particular candidate (as distinct from "generic" appeals for support for the party's candidates as a group). See page 3, *supra*. That determination is made on a case-by-case basis and depends upon whether the communication "(1) depict[s] a clearly identified candidate and (2) convey[s] an electioneering message." AO 1985-14, at 11,185; see page 3, *supra*. If the expenditure is attributable to a particular candidate, it is then conclusively deemed to be coordinated with that candidate, based on the categorical determination that "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates." *DSCC*, 454 U.S. at 28-29 n.1. See 11 C.F.R. 110.7(b)(4) (party committees "shall not make independent expenditures in connection with the general election campaign of candidates for Federal

office"); FEC Advisory Op. 1988-22, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5932, at 11,471 n.4 (July 5, 1988) (with respect to the campaign expenditures of political party committees, "coordination with candidates is presumed and 'independence' precluded").

1. The Commission's standard for determining whether a party expenditure is attributable to a particular candidate is entitled to substantial deference from a reviewing court. As this Court recognized in *DSCC*, the Commission's broad statutory powers, its "inherently bipartisan" character, and the fact that its jurisdiction involves "the dynamics of party politics," make it "precisely the type of agency to which deference should presumptively be afforded." 454 U.S. at 37. See also, *e.g.*, *FEC* v. *Ted Haley Congressional Comm.*, 852 F.2d 1111, 1115 (9th Cir. 1988) (interpretations of the Act "by the FEC through its regulations and advisory opinions" are entitled to deference); *Common Cause* v. *FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (deference is "particularly appropriate" in FEC cases); *Orloski* v. *FEC*, 795 F.2d at 164 (FEC's advisory opinion authority indicates that "Congress intended the Commission to fill in gaps left in the statute and to resolve any ambiguities in the statutory language"); *National Republican Congressional Comm.* v. *Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986) (declining to resolve private lawsuit before FEC had construed relevant FECA provision, "[i]n light of the deference that must be accorded the FEC's interpretation of its own statute").

Petitioners challenge the court of appeals' decision to accord deference to the FEC's application of the statutory restrictions on political party expenditures. They contend (Br. 47-49) that in AO 1985-14 the Commission departed without explanation from a prior pronouncement that the Act's monetary limitations would apply to political party expenditures only if the communications in

question contained express advocacy.[19] In support of that assertion, petitioners rely on a single sentence from FEC Advisory Op. 1978-46, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978) (AO 1978-46), in which the Commission responded to an inquiry concerning legal restrictions on certain uses of corporate funds in connection with a party convention and newspaper. The Commission stated that "[t]he Federal statute relevant to your questions is 2 U.S.C. § 441b," *id.* at 10,346, and explained at length how that provision applied to the corporate expenditures described. The Commission then observed that, "if the newsletter includes communications expressly advocating the election or defeat of a clearly identified candidate for Federal office, the expenses of the newsletter attributed to those communications * * * must be treated as a general election expenditure of the Party under 2 U.S.C. § 441a(d)." *Id.* at 10,347.

That statement does not conflict with the "clearly identified candidate"/"electioneering message" standard subsequently enunciated in AO 1985-14. Any communication containing express advocacy would necessarily satisfy

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[19] Petitioners' additional contention (Br. 46-47) that Section 437f precludes deference to the Commission's advisory opinions unless they are promulgated as regulations was neither pressed nor passed upon below, and this Court therefore should not consider it. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). In any event, the argument is without merit. Advisory Opinions 1984-15 and 1985-14 did not adopt legislative rules of the sort requiring a formal rulemaking, but merely interpreted the terms of the Act "with respect to a specific transaction or activity," as provided in Section 437f. The construction of the Act enunciated in those advisory opinions is analogous to an interpretive rule, to which a reviewing court owes deference.. See, *e.g.*, *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 922 (D.C. Cir. 1991), cert. denied, 503 U.S. 970 (1992); *Kennedy* v. *Shalala*, 995 F.2d 28, 30 n.3 (4th Cir. 1993); *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 154 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993).

the "electioneering message" standard of AO 1985-14, and AO 1978-46 did not state that communications that do not contain express advocacy cannot be coordinated party expenditures. That the language upon which petitioners rely was not intended to represent a limiting construction is shown by the remainder of the paragraph in which it appears, in which the Commission explained that the expenditures to which it was referring were those made "on behalf of a clearly identified candidate and [that] can be directly attributed to that candidate." AO 1978-46, at 10,347 (quoting 11 C.F.R. 106.1(c)). The Commission confirmed the latter formulation just two weeks later in FEC Advisory Op. 1978-50, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5353 (Sept. 19, 1978) (AO 1978-50), when the Commission stated that an expenditure for a get-out-the-vote drive would be subject to the Act's limitations on coordinated expenditures only if "those expenditures are made on behalf of clearly identified candidates to whom the expenditures can be directly attributed." *Id.* at 10,355. AO 1978-50 did not mention "express advocacy," but affirmed that the expenditure would be attributable to a federal candidate "if the purpose of the drive is to advocate the election of one or more clearly identified candidates for Federal office." *Id.* at 10,354. Petitioner has failed to identify a single instance in which the Commission has found, either in an advisory opinion or in an enforcement context, that a party expenditure was not subject to the Act's monetary restrictions because it did not contain express advocacy.

2. The Act defines a "political party" as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16). The FEC's determination that political parties are "incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates," *DSCC*, 454 U.S. at 28-29 n.1, is entitled to substantial

deference. That determination rests in part on the empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election.[20] The more significant point, however, is that a political party's function of nominating candidates and sponsoring them on the ballot is inconsistent with independent promotion of the candidates' election. Other groups or individuals bound as closely to a candidate's campaign as the candidate's party would also be incapable of making independent expenditures. See FEC Advisory Op. 1980-116, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5565 (Nov. 14, 1980); FEC Advisory Op. 1979-80, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5469 (Mar. 12, 1980); FEC Advisory Op. 1982-20, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5665 (Apr. 26, 1982). See also *FEC* v. *National Conservative Political Action Comm.*, 647 F. Supp. 987 (S.D.N.Y. 1986). Indeed, petitioner conceded in the court of appeals that its expenditures are correctly considered to be coordinated. See Pet. C.A. Br. 18-19 ("The Colorado Party

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[20] It is especially clear in the present case that the Committee was in fact coordinating with the eventual Republican nominee when "Wirth Facts #1" was aired, and that the expenditure for that advertisement was made to diminish Democratic candidate Wirth's chances against that nominee in the general election. The Committee's chairman testified that when the advertisement aired he was already "as involved as I could be" in the campaigns of all three candidates for the Republican nomination and that he "made all of the assets of the party that I could available to all three of them until the convention in which case we merged with the number one candidate and I made them all available to that one candidate." J.A. 195-196. The chairman testified that he decided to run the advertisement when he did because then-Representative Wirth "was getting away with saying things that were not being refuted by anyone and we had no candidate to refute it, and the only possible person to refute that was the party." J.A. 197.

cannot by law make 'independent expenditures,' nor does it wish to. The Colorado Party's argument is that it should be permitted to make unlimited 'coordinated expenditures' in support of its own candidates just as other groups are permitted to make unlimited 'independent expenditures.' ") (footnote omitted). See also Democratic National Committee, et al., Amicus Br. 14-15 ("[I]t is reasonable to assume * * * that parties cannot make 'independent' expenditures in the same way as other kinds of organizations" because of their "unique need to communicate and coordinate with their candidates").

That Congress regarded political party campaign expenditures as necessarily coordinated with the party's candidate is further demonstrated by the legislative history accompanying the 1976 amendments to the FECA. The Conference Report notes that Section 441a(d) serves to permit political party expenditures that would otherwise run afoul of the Act's limits on contributions:

> This limited permission allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process. Thus, but for this subsection, these expenditures would be covered by the contribution limitations stated in subsections (a)(1) and (a)(2) of this provision.

H.R. Conf. Rep. No. 1057, *supra*, at 59. That discussion presumes that party committee campaign expenditures fall within the statutory definition of "contributions."

II. THE FECA'S RESTRICTIONS ON COORDINATED EXPENDITURES MADE BY POLITICAL PARTIES DO NOT VIOLATE THE FIRST AMENDMENT

As we explain above, the payments at issue in this case are properly regarded as coordinated party expenditures and are therefore subject to the restrictions established by Section 441a(a) and (d)(3). Those restrictions do not

violate the First Amendment. The statutory limitations on expenditures by political parties serve two compelling governmental interests. First, the limitations serve to prevent both the reality and the appearance of quid pro quo corruption by the political parties themselves. Second, the limits help to prevent circumvention of the Act's restrictions on campaign contributions by other donors.

A. By Limiting Campaign Expenditures Coordinated With Candidates, Section 441a Serves A Compelling Governmental Interest In Avoiding Corruption And The Appearance Of Corruption

Beginning with *Buckley* v. *Valeo*, this Court has recognized a constitutional distinction between limitations on contributions to political candidates and limitations on independent expenditures. The Court in *Buckley* recognized that the FECA's contribution and expenditure limitations both limit associational and expressive activities protected by the First Amendment, and that such limits can be upheld only if they serve compelling governmental interests. See 424 U.S. at 14-15, 19-23 (per curiam). The Court upheld the FECA's limitations on contributions because those limits serve a compelling interest in preventing the corruption of candidates. The Court recognized that, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27.

The Court struck down the Act's limitations on independent expenditures, however, reasoning that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47 (per curiam). The Court held the independent expenditure limits to be

unconstitutional "because [it] found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (*NCPAC*). The Court has continued to emphasize the "fundamental constitutional difference" between contributions and independent expenditures, *ibid.*, and has uniformly upheld the Act's restrictions on contributions in candidate elections. See, *e.g.*, *California Medical Ass'n* v. *FEC*, 453 U.S. 182 (1981); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197 (1982) (*NRWC*).

As we describe above, see pages 2, 15, *supra*, Congress has determined that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, * * * shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). See *Buckley* v. *Valeo*, 424 U.S. at 46 (per curiam) ("expenditures controlled by or coordinated with the candidate and his campaign * * * are treated as contributions rather than expenditures under the Act"); *NCPAC*, 470 U.S. at 492 (coordinated expenditures "are considered 'contributions' under the FECA, and as such are already subject to [the] $1,000 and $5,000 limitations in §§ 441a(a)(1), (2)") (citation omitted). Because of a party committee's close and continuous relationship with the party's candidates, this Court has recognized that all expenditures by such a committee that are attributable to an individual election must be considered coordinated. *DSCC*, 454 U.S. at 28-29 n.1; see pages 26-28, *supra*. The statutory restrictions on party expenditures therefore fall within the anti-corruption rationale on which this Court has repeatedly relied.[21]

[21] As the Court noted in *Buckley*, the Act's contribution limits were originally based in part on two additional purposes: the desire "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections," 424 U.S. at 25-26 (per curiam), and the belief that "the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money," *id.* at 26. The Court in *Buckley* held that those purposes did not constitute compelling governmental interests that could justify the Act's restrictions on independent expenditures. *Id.* at 55-57. The Court concluded, however, that "[i]t is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26.

In the wake of this Court's decision in *Buckley*, Congress amended and reenacted the FECA, including Section 441a(d)'s provisions dealing specifically with campaign expenditures by political parties. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475. Both the text of Section 441a(d) and the pertinent 1976 legislative history reflect Congress's understanding that party expenditures in connection with federal election campaigns fall within the coverage of the Act's contribution limits, except insofar as Section 441a(d) permits political parties to make expenditures that would otherwise be barred. Thus, whatever combination of factors may have initially motivated Congress to limit expenditures by political parties, Congress chose to retain those limits after this Court's decision in *Buckley*. There is consequently no basis for petitioners' suggestion (Br. 27) that those limits should be regarded with particular suspicion on the ground that they were "expressly adopted for an unconstitutional purpose."

Petitioners contend that (1) because political parties pose no danger of actual or perceived corruption, they are constitutionally exempt from the limitations applicable to other contributors, and (2) Section 441a impermissibly discriminates against political parties by subjecting them to restrictions more stringent than those applicable to other organizational donors. Those arguments are incorrect.

1. a. Petitioners contend (Br. 26-34) that the Commission must produce record evidence showing that federal candidates have in fact been corrupted by contributions from political parties in order to justify the statutory

limitations on party expenditures. That argument ignores this Court's holding in *Buckley* that avoiding actual corruption is not the only compelling interest justifying limits on contributions and coordinated expenditures. As the *Buckley* Court recognized, "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27 (per curiam). See *NRWC*, 459 U.S. at 208 ("[I]n *Buckley*, * * * we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.").

Because it is the opportunity for a quid pro quo that creates the appearance of corruption, the Court in *Buckley* did not require evidence of actual corruption by particular classes of contributors. Indeed, the *Buckley* Court assumed that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29 (per curiam). The Court nevertheless upheld the FECA's $1,000 limit on individual contributions to candidates and political committees. The Court explained that it is "difficult to isolate suspect contributions," and that "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.[22] In dealing

[22] The Court emphasized that point when it upheld the application of the contribution limits to members of a candidate's immediate family, although it was not presented with either record evidence or legislative findings of familial corruption. The Court acknowledged that "the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members," but found that fact insufficient to support a conclusion "that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as non-family contributors." *Buckley* v. *Valeo*, 424 U.S. at 53 n.59 (per curiam).

with contributions and coordinated expenditures, the Court has consistently "accept[ed] Congress' judgment" and has refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210.[23] As the court of appeals in the instant case observed, "[t]he members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties." J.A. 47-48.

b. Petitioners' argument that political parties are incapable of corrupting party candidates is unpersuasive. Party committees are not abstract, disembodied entities. As this Court has observed, "[i]n the nature of things, a [party] committee must act through its employees and agents." *DSCC*, 454 U.S. at 33. There is no reason to believe that the individuals who control party committees are immune from the corrupting temptations and self-

[23] See also *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2378 (1995) (statute can be justified even under "strict scrutiny" based "solely on history, consensus, and 'simple common sense' ") (quoting *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992) (opinion of Blackmun, J.)). Petitioners' reliance (Br. 26) on *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003 (1995), is misplaced. The Court concluded in that case that the government had failed to show that its interest in workplace efficiency justified a broad ban on compensated writings and speeches by rank and file government employees. When it came to the possibility of influencing officials, however, the Court found that "Congress reasonably could *assume* that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate a similar appearance of improper influence." *Id.* at 1016 (emphasis added).

interest of other persons. To the contrary, history demonstrates that individual officials of political organizations are particularly well-situated to exert a corrupting influence upon candidates and officeholders in order to advance their private interests.[24] See generally, *e.g.*, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 88 n.4 (1990) (Stevens, J., concurring); *Igneri* v. *Moore*, 898 F.2d 870, 876 (2d Cir. 1990) (State may enact legislation to deter party officials from "capitalizing on their special relationships" with public officials to "curry[] favor for themselves and their associates").[25]

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[24] That history includes such notorious examples of corrupt political organizations as the Boss Tweed and the Tammany Hall machine, the 1876 Tilden/Hayes presidential election, the Custom House scandals of the 1880's, Teapot Dome, the Prendergast Machine, and Watergate. See, *e.g.*, Nathan Miller, *The Founding Finagler* (1976); Shelley Ross, *Fall from Grace: Sex, Scandal, and Corruption in American Politics from 1702 to the Present* (1988). If petitioners are correct in their assertion (Br. 31 n.20) that there have been no major public scandals involving party officials during the last 20 years, that fact may be evidence that the FECA's restrictions on party expenditures have been successful, rather than evidence that those restrictions are no longer needed. Cf. *Burson* v. *Freeman*, 504 U.S. at 208 (opinion of Blackmun, J.) ("The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them.").

[25] Petitioners argue (Br. 5, 30, 31, 32) that political parties are "insulate[d] * * * from any potentially corruptive influences" by the Act's disclosure requirements and restrictions on the amount and sources of contributions they can accept, and by the voluntary nature and diverse sources of the contributions they receive. Petitioners, however, are not unique in those respects. All political committees are voluntary associations that can accept contributions in amounts subject to the same limits in the Act that are applicable to petitioners, and all political committees must publicly report their contributions and expenditures. Nor does the diversity of a party committee's supporters distinguish it from an independent political committee, whose coordinated expenditures are subject to the Act's contribution limits. See *NCPAC*, 470 U.S. at 494 ("[A]pproximately 101,000 people contributed an average of $75 each to NCPAC and * * * approximately 100,000 people contributed an average of $25 each to [Fund for a Conservative Majority]."). Thus, with party committees, no less than other political committees, "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption." *Buckley* v. *Valeo*, 424 U.S. at 28 (per curiam).

In any event, the danger at which the Act's contribution limitations are directed does not depend on the invidious motivation of the contributor. As this Court observed in *Buckley*, "the primary interest served by [the FECA] is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25 (per curiam). Congress may legitimately attempt to combat that form of "corruption" even where the contributor who seeks to exercise "coercive influence" over the formulation of public policy is motivated solely by a concern for the common good. Thus, contrary to petitioners' suggestion (see Br. 32), the propriety of Congress's decision to limit political party expenditures in no way depends upon the assumption that party officials will be corrupt or self-serving.

Nor is there a basis for petitioners' contention (Br. 21) that "any effect the parties may have on candidates constitutes democracy, not corruption." Officials of political parties may legitimately seek in a variety of ways to influence the behavior of party members who hold federal offices. The FECA's restrictions on coordinated party expenditures do not reflect the view that parties and their officers should be precluded from exercising such influence. They reflect instead Congress's determination, repeatedly sustained by this Court in *Buckley* and its progeny, that efforts to influence public policy *by means of monetary contributions to candidates for federal office* pose distinctive dangers to the integrity of the democratic

process.[26] That party officials may have alternative methods of accomplishing the same ends does not mean that they are constitutionally entitled to employ the "coercive influence of large financial contributions," *Buckley* v. *Valeo*, 424 U.S. at 25 (per curiam), in seeking obedience to their views.[27]

This Court has recognized that "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). Political parties have no special status under

[26] The Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, authorizes federal funding for presidential candidates who satisfy the statutory criteria. Under the Act, federal funds are paid directly to the candidate. 26 U.S.C. 9006(b). An earlier proposal to provide campaign funds to the political parties rather than to the candidates was changed to ensure, *inter alia*, that "a national committee of a political party will not be able to use control of a large Federal payment as a weapon to dictate party policies and strategies to * * * candidates and potential candidates." S. Rep. No. 714, 90th Cong., 1st Sess. 15 (1967). See also, *e.g.*, *Playing Hardball: How Reaganites Push Reluctant Republicans to Back Tax-Rise Bill*, Wall St. J., Aug. 18, 1982, at 1 (Republican National Committee deputy chairman convinced two reluctant congressmen to vote for the President's budget cuts by offering them coordinated party expenditures. "The two congressmen rallied behind their president. And if they hadn't? 'I would have nailed them to the wall,' vows the deputy chairman."); Donna Cassata, *GOP Retreats on Hatfield, But War Far From Over*, Cong. Q., Mar. 11, 1995, at 728 ("[C]hairman of the National Republican Senatorial Committee * * * suggested the day after the vote [rejecting a balanced budget amendment] that the party might withhold funds from [Senator] Hatfield's reelection campaign in 1996 as punishment.").

[27] Officials such as the President, the Speaker of the House of Representatives, and the Senate majority and minority leaders exercise influence over the voting behavior of legislators within their own political parties. No one would suggest, however, that the occupants of those offices could assert a constitutional right to make or direct monetary contributions to candidates for the Senate or House in amounts greater than those permitted by the FECA.

the Constitution, however, that would require that they be exempted from the limits on coordinated expenditures that apply to other voluntary organizations (whose members also possess a constitutionally protected "freedom to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).[28] See *Republican Party of Arkansas* v. *Faulkner County*, 49 F.3d 1289, 1297 (8th Cir. 1995) ("The rights of political parties derive from the associational rights of members and candidates, and it would make little sense to afford greater protection to the rights of political parties than to the rights of voters and candidates.") (citation omitted). Since "[p]artisan politics bears the imprimatur only of tradition, not the Constitution," *Elrod* v. *Burns*, 427 U.S. 347, 369 n.22 (1976) (opinion of Brennan, J.), the First Amendment provides no greater protection for the coordinated expenditures of political parties than for those of other private groups.[29]

[28] Petitioners point out (Br. 35) that their coordinated expenditures were for public advocacy, and not merely the symbolic expression of support conveyed by a gift of money. That is equally true, however, of coordinated expenditures made by corporations and unions through their separate segregated funds, and those made by other groups and individuals. In *Buckley*, this Court nevertheless found that the compelling interest in avoiding the appearance of corruption justified regulating coordinated expenditures under the Act's contribution limits. 424 U.S. at 26-29, 46-47 & n.53 (per curiam).

[29] The Founders considered the diversity of interests and views that would result from individual legislators' accountability to separate constituencies to be an essential check against the potential for tyranny by a cohesive and domineering majority in Congress. See *The Federalist* No. 10 (Madison), at 83 (Rossiter ed., 1961). *Cf. Oregon* v. *Mitchell*, 400 U.S. 112, 134 (1970) (opinion of Black, J.) (it is "[e]ssential to the survival * * * of our national government" that "the officials who fill [elective] offices are as responsive as possible to the will of the people whom they represent"). Party leaders have come to exercise substantial influence

2. Petitioners argue (Br. 28, 31-32, 35) that the FECA unconstitutionally discriminates against political parties by imposing limits upon their expenditures more stringent than those applicable to corporations, unions and other political committees. That contention is unpersuasive.[30] Petitioners' attempt (Br. 31) to liken a party

over the voting behavior of party members within the Congress. Whatever the advantages and disadvantages of that influence as a matter of policy, the First Amendment cannot be thought to confer on party officials a constitutional entitlement to acquire the sort of centralized control against which the Founders sought to guard.

Amici Committee for Party Renewal, et al., argue (Br. 24) that "[t]he more a candidate depends on the party [for campaign support], the greater the party's ability to apply its leverage to achieve policy coherence and mobilize party majorities in Congress." These amici further contend (Br. 15) that "[t]he party system, when it operates properly, overcomes the handicaps to governance imposed by the separation of powers." As Madison explained, however, what these amici view as "handicaps" were included in the Constitution for a reason. The Constitution can hardly be thought to require Congress to fashion its legislation so as to facilitate efforts to "overcome" constitutional safeguards.

[30] Petitioners suggest (Br. 6 n.5) that independent groups make independent expenditures far in excess of the coordinated expenditures that party committees are permitted to make under Section 441a(d). In 1986, however—the year in which the violation in this case occured—independent expenditures totaled $10,205,153 nationwide, while the Republican and Democratic party committees throughout the country made a total of $23,317,430 in coordinated expenditures on behalf of party nominees. FEC Press Release, *FEC Final 1985-86 Report On Political Parties Shows Decline In Financial Activity* (May 5, 1988); FEC Press Release, *Final FEC Report On 1985-86 Independent Expenditures Shows Change in Spending Patterns* (Mar. 31, 1988). It should also be noted that the Institute for Legislative Action is, contrary to petitioners' suggestion (Br. 6 n.5), the lobbying arm of the National Rifle Association and is prohibited from making expenditures in connection with federal elections; the NRA's separate segregated fund is called the Political Victory Fund. See *FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 822-823 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994). According to its disclosure reports

committee to the incorporated advocacy organization involved in *MCFL* does not advance their argument, for such corporations are entirely prohibited from making contributions and coordinated expenditures. See 2 U.S.C. 441b.[31]

As shown above, the purpose of Section 441a(d) is to permit committees operated by political parties to make coordinated expenditures far in excess of those that can be made by any other entity. See pages 16-17, *supra*. Thus, petitioners could have spent more than $100,000 in opposing Representative Wirth's Senate campaign if they had not assigned that right to the NRSC. See *DSCC*, 454 U.S. at 41 ("The delegation of spending authority is an option, not a requirement, and it is an option resting entirely with the state committees."). Congress also in-

on file with the Commission, the Political Victory Fund made $1,519,349 in independent expenditures in connection with federal elections in 1994. Petitioners' assertion about the amount the AFL-CIO has claimed it intends to spend in 1996 ignores the difference between contributions to candidates and independent expenditures. In 1994, the AFL-CIO's separate segregated fund made only $2,500 in independent expenditures, and the separate segregated funds of all labor organizations spent a combined total of $104,293 on independent expenditures nationwide; however, the AFL-CIO's fund contributed $981,439 to candidates, and labor organization funds contributed a total of $41,867,393 directly to candidates. See disclosure reports of AFL-CIO COPE, on file with the Federal Election Commission; FEC Press Release, *1994 PAC Activity Shows Little Growth Over 1992 Level, Final FEC Report Finds* (Nov. 1995).

[31] *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and *MCFL*, 479 U.S. at 263-264, found a small class of nonprofit, incorporated political advocacy organizations that accept no income from other corporations or unions to be exempt only from statutory limits on *independent* expenditures. In *MCFL*, the Court contrasted the limitation of independent expenditures with the regulation of contributions from political advocacy corporations such as MCFL, *id.* at 259-262, and confirmed that such corporations are subject to the same statutory prohibition on candidate contributions as are other corporations, *id.* at 264 n.13.

cluded other special accommodations to party activities. See 2 U.S.C. 431(8)(B)(v), (x) and (xii), 431(9)(B)(iv), (viii) and (ix), 441a(a)(4).[82] Congress declined, however, to enact a proposed amendment that would have exempted some party committees entirely from the contribution limits. See *DSCC*, 454 U.S. at 35 n.11. Congress thus endeavored to strike an appropriate balance between the prevention of actual or apparent corruption and the desire to "assur[e] that political parties will continue to have an important role in federal elections." *Id.* at 41. This Court should reject petitioners' request to refashion the balance struck by Congress. Cf. *NRWC*, 459 U.S. at 210 (observing that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process' ") (quoting *California Medical Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981)).[83]

[82] In light of those provisions, there is no basis for petitioners' assertion (Br. 23, 27-28) that Section 441a prevents a party committee from mailing letters to its supporters. See also 11 C.F.R. 100.7(b)(15), 100.8(b)(16) (exempting from the definitions of "contribution" and "expenditure" payments made by state parties to distribute brochures or newsletters, if the distribution is done by volunteers rather than commercial vendors and a commercial mailing list is not used).

[83] The petition for a writ of certiorari argued (Pet. 14) that Section 441a(d)'s population-based formula for calculating the coordinated party expenditure limit in each State "refute[s] an 'anti-corruption' purpose." Petitioners appear to have abandoned that argument in their brief on the merits. In any event, the statutory formula reflects Congress's recognition that the expense of campaigning is generally proportional to the number of potential voters in a particular election. The formula preserves a roughly comparable role for political parties in Senate campaigns in each State. Determining the precise level of appropriate contribution limits is a legislative judgment that does not raise constitutional concerns, *Buckley* v. *Valeo*, 424 U.S. at 30 (per curiam), and Congress is not precluded from considering other policy objectives in fashioning the legislation, see *id.* at 36, 84 n.112.

B. The FECA's Restrictions On Coordinated Party Expenditures Also Serve A Compelling Governmental Interest In Preventing Evasion Of The Limits On Individual And Political Committee Contributions

The statutory limitations on coordinated party expenditures also serve a separate compelling interest in preventing circumvention of the $1,000 limit on individual contributions to candidates. See 2 U.S.C. 441a(a)(1)(A). In *Buckley*, the Court found the Act's $25,000 yearly limit on total contributions by an individual to all candidates and political committees to be constitutional even though it imposes "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." 424 U.S. at 38 (per curiam). The Court found that provision to be a permissible "corollary of the basic individual contribution limitation that we have found to be constitutionally valid" because it "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.* In *California Medical Ass'n* v. *FEC*, 453 U.S. at 198, a plurality of the Court similarly upheld the $5,000 limit on individual contributions to independent political committees, 2 U.S.C. 441a(a)(1)(C), because without it "an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee."

The statutory restrictions at issue here serve a similar purpose. Although individuals can contribute no more than $1,000 to a candidate, they can contribute up to $5,000 to a multicandidate political committee operated by a state political party, and up to $20,000 to a political

committee operated by a national political party. 2 U.S.C. 441a(a). An individual who wished to provide financial support to a candidate in excess of the $1,000 limit might attempt to circumvent that statutory restriction by making a large contribution to that candidate's political party, with the expectation that the party would in turn expend the funds in support of the candidate.

Petitioners suggest (Br. 32) that the fear of such arrangements is "implausible" because the party effectively insulates the candidate from the contributor. Nothing in the Act, however, precludes candidates and officeholders from urging their contributors to make additional contributions to a party committee. Indeed, such solicitation of contributions to party committees by candidates is not unusual.[34] Party committees can, and do, work closely with other political committees in raising funds, and large contributors and fundraisers for a political party may

[34] In entering into a conciliation agreement resolving a set of administrative complaints, the FEC recently agreed that "[t]he [Act] does not prohibit party committees from referring to and promoting party candidates in soliciting funds for the committee and candidates may assist party committees in soliciting funds for the committee." See Conciliation Agreement, Matter Under Review (MUR) 3620, at 4 (¶ IV(11)) (Aug. 21, 1995). See also, *e.g.*, Iver Peterson, *Accepting "Soft Money" As a Necessary Evil*, N.Y. Times, Dec. 29, 1994, at B5 (New Jersey Senator "Lautenberg's office * * * is known to work closely with the state party's fund-raising apparatus"); Tom Kenworthy, *House Democratic Campaign Unit Running Into Turbulence*, Wash. Post, Aug. 2, 1989, at A6 ("The party's new leadership in the House—Speaker Thomas S. Foley (Wash.), Majority Leader Richard J. Gephardt (Mo.) and Majority Whip William H. Gray III (Pa.)—all have committed themselves to active fund-raising roles for the committee."); *Associated Press, Dems: Record Fund-Raising Qtr*, Apr. 19, 1994 ("Boosted by President Clinton's attendance at three major events, the Democratic National Committee raised nearly $10.2 million in the first three months of 1994"); William Presecky, *Mrs. Bush says yes, Clinton no to Du Page*, Chi. Trib., Mar. 12, 1992, at 5 ("all three Democratic candidates seeking the party's nomination for U.S. Senate" were to keynote "the party's fundraiser").

well earn the support of party leaders when their interests are at issue in Congress.[35] Even if a large contribution to a party committee is not specifically earmarked to support a candidate who may have solicited it, the potential for actual or perceived quid pro quo arrangements would be greatly increased if there were no limit on the party's coordinated expenditures. As this Court held in *Buckley*, Congress may act to ensure that the individual contribution limit is not evaded "through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38 (per curiam). See also *Gard* v. *Wisconsin State Elections Board*, 456 N.W.2d 809, 823 (Wis.) ("By placing restrictions on the party-related committee's ability to contribute, the corrupting influence of large contributions to that committee, is diffused."), cert. denied, 498 U.S. 982 (1990). For this additional reason, the FECA's limitation on coordinated expenditures made by political parties does not violate the First Amendment.

C. The Statutory Restrictions On Coordinated Party Expenditures Are Not Unconstitutionally Vague

Petitioners contend (Br. 36-41) that Section 441a(d) is void for vagueness unless it is construed to incorporate an "express advocacy" test. That argument is without merit.

1. As we emphasize above, see pages 16-17, *supra*, Section 441a(d) is not an additional restriction on polit-

[35] "All six national party organizations have formed loose fund-raising alliances with some of the larger and wealthier PACs, and the parties have been successful in getting substantial amounts of money from them. In return for their party support, PAC officials receive regular party briefings, meet informally with powerful representatives and senators, and get introductions and access to other key politicians." Paul Herrnson, *Party Campaigning in the 1980s*, at 45 (1988).

ical party expenditures. Rather, it provides authorization for coordinated party expenditures that would otherwise be prohibited by the Act's limits on contributions. Invalidation of Section 441a(d) on vagueness grounds therefore would not assist petitioners' cause unless the statutory restrictions on contributions were also deemed impermissibly vague. The Court in *Buckley*, however, sustained the contribution limits against a vagueness challenge, see 424 U.S. at 76-78 (per curiam), and petitioners provide no reason for the Court to revisit that holding here.

2. The statutory provisions governing coordinated party expenditures, as construed by the Commission's advisory opinions, provide fully adequate warning as to the nature of the prohibited conduct. People of "common intelligence," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973), would have no difficulty understanding that an advertisement explicitly linking an attack on the record of an opposing candidate with his ongoing Senate campaign contained an "electioneering message." [36] In such circumstances neither the FECA nor the Commission's

[36] Petitioners observe (see Br. 14) that the Commission found probable cause to believe that their expenditure on "Wirth Facts #1" was covered by Section 441a but did not make a similar finding with respect to their expenditures on other advertisements critical of then-Representative Wirth. Petitioners contend (Br. 14-16, 39) that no meaningful difference between the advertisements exists and that the Commission's disparate treatment of them demonstrates the vagueness of the agency's standard. Unlike the other advertisements in question, however, "Wirth Facts #1" expressly linked its criticisms to Wirth's ongoing Senate campaign and explicitly challenged the integrity of Wirth's campaign statements. See Pet. App. 93a-105a; J.A. 147 (at press conference contemporaneous with broadcast of "Wirth Facts #1," Chairman of Colorado Republican Party asserted that Wirth had "purchased television time to baldly misstate his record on two key issues: defense and federal spending"). That distinction is relevant to the question whether the advertisements in question contained an "electioneering message."

construction of it can be found unconstitutionally vague, even if the Act "may leave room for uncertainty at the periphery." *NRWC*, 459 U.S. at 211.

Moreover, the statute provides a procedure for obtaining an advisory opinion from the Commission, see 2 U.S.C. 437f, which enables a party committee to "remove any doubt there may be as to the meaning of the law," *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973), with respect to a proposed expenditure. By "offer[ing] a prompt means of resolving doubts with respect to the statute's reach," Section 437f "mitigates whatever chill may be induced" by the Act. *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 384-385, 386 n.44 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980). The Court in *Buckley* found the advisory opinion procedure insufficient to alleviate the statute's vagueness problems with respect to limitations on independent expenditures; it held that reliance on advisory opinions was "unacceptable because the vast majority of individuals and groups subject to criminal sanctions * * * do not have a right to obtain an advisory opinion from the Commission." 424 U.S. at 40 n.47 (per curiam). As noted in *Martin Tractor*, however, Congress has since amended Section 437f to require the Commission to provide an advisory opinion to any "person," 2 U.S.C. 437f(a)(1), and "the susceptibility of the FECA to challenge on the grounds of vagueness has consequently been reduced." 627 F.2d at 386 n.44.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, provides in relevant part:

§ 431. Definitions

When used in this Act:

* * * * *

(8)(A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; * * *

* * * * *

(9)(A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; * * *

* * * * *

(17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

* * * * *

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

* * * * *

(7) For purposes of this subsection—

* * * * *

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or

at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

* * * * *

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal

office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

* * * * *

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